Anwar et al v. Fairfield Greenwich Limited et al Doc. 158

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants.	Master File No. 09-CV-118-VM This Document Relates To: 09-CV-2269-VM (*Knight* Action)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION OF THE FAIRFIELD INVESTOR GROUP FOR APPOINTMENT AS LEAD PLAINTIFF AND APPOINTMENT OF LEAD COUNSEL AND IN OPPOSITION TO COMPETING MOTIONS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. THE PSLRA'S LEAD PLAINTIFF FRAMEWORK 2

II. COMPETING MOVANTS ARE INADEQUATE TO REPRESENT THE CLASS 3

   A. The Anwar Plaintiffs Have Interests Antagonistic to the Class...................3

   B. The Anwar Plaintiffs Will Not Vigorously Prosecute the Federal Securities Law Claims 5

   C. The Knight Group Lacks Standing and Authority to Proceed in This Action..7

CONCLUSION...10

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. Bechtel Power Corp.,
780 F.2d 124 (1st Cir. 1985) 5

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 7

In re Cable & Wireless, PLC Sec. Litig.,
217 F.R.D. 372 (E.D. Va. 2003) 3

Constance Sczesny Trust v. KPMG LLP,
223 F.R.D. 319 (S.D.N.Y. 2004) 3

E. Tex. Motor Freight Sys. Inc. v. Rodriguez,
431 U.S. 395 (1977) 6

In re eSpeed, Inc. Sec. Litig.,
232 F.R.D. 95 (S.D.N.Y. 2005) 3, 6, 7

Evans v. IAC/Interactive Corp.,
244 F.R.D. 568 (C.D. Cal. 2007) 5

Feder v. Elec. Data Sys. Corp.,
429 F.3d 125 (5th Cir. 2005) 4, 5

Kaplan v. Gelfond,
240 F.R.D. 88 (S.D.N.Y. 2007) 7

In re NASDAQ Market-Makers Antitrust Litig.,
169 F.R.D. 493 (S.D.N.Y. 1996) 3

Smith v. Suprema Specialties, Inc.,
206 F. Supp. 2d 627 (D.N.J. 2002) 7

W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP,
549 F.3d 100 (2d Cir. 2008) 7, 8

Weinberg v. Atlas Air Worldwide Holdings, Inc.,
216 F.R.D. 248 (S.D.N.Y. 2003) 7

STATUTES

15 U.S.C. § 78u-4(a) .... *passim*

OTHER AUTHORITIES

Fed. R. Civ. P. 17 8

Fed. R. Civ. P. 23 ....2, 3

Madanes Investment & Enterprise Ltd., Carling Investment Ltd., Shimon Laor, and Arie and Dafna Gruber (collectively, the "Fairfield Investor Group" or "Group") respectfully submit this memorandum of law in further support of their motion, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), for appointment as lead plaintiff and appointment of lead counsel, and in opposition to competing motions. 15 U.S.C. § 78u-4(a)(3)(B).

INTRODUCTION

Three motions for appointment of lead plaintiff and lead counsel are currently pending before this Court: (1) the motion of the Fairfield Investor Group, which claims losses of $916,890 as a result of the fraud alleged herein; (2) the motion of Knight Services Holdings Ltd., the Samba Trust, the Casoti Trust, the Chartwell Trust, and the White Chapel Trust (the "Knight Group"), who claim losses of apparently $1,500,000[1]; and (3) Securities & Investment Company Bahrain, Harel Insurance Company, Ltd., AXA Private Management, St. Stephen's School, and Pacific West Health Medical Center, Inc. Employees' Retirement Trust (collectively, the "Anwar Plaintiffs"), who claim losses of $23,262,062. These movants seek appointment to pursue claims for violations of the federal securities laws, including the Securities Exchange Act of 1934 (the "Exchange Act"), on behalf of a class of investors who, between March 11, 2004 and December 10, 2008, inclusive (the "Class Period"), acquired shares of Fairfield Sentry Limited ("Fairfield" or the "Fund") and were damaged thereby.

In determining which investor or investors to appoint as lead plaintiff, the PSLRA instructs this Court to decide who, among all of the competing movants, "has the largest financial interest in the relief sought by the class" and "otherwise satisfies the requirements of

[1] The Knight Group did not provide a loss figure in its motion papers. Counsel for the Fairfield Investor Group has calculated a loss figure of $1,500,000 based on information provided in the group's certifications. *See* Knight Group Mem. at Exs. 2-3.

Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Although the Anwar Plaintiffs purport to have the largest financial interest in this litigation, they are incapable, by their own admission, of "adequately representing the class." *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The Knight Group is also inadequate because of its lack of standing and authority to proceed in this action. The Court should therefore deny the Anwar Plaintiffs' and Knight Group's motions and appoint the Fairfield Investor Group as lead plaintiff and their counsel, Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein"), as lead counsel for the federal securities law claims, which require separate leadership and representation.[2]

ARGUMENT

I. THE PSLRA'S LEAD PLAINTIFF FRAMEWORK

The PSLRA sets forth procedures for the selection of a lead plaintiff in class actions brought under the Exchange Act. 15 U.S.C. § 78u-4(a)(1). The PSLRA requires the court to consider all motions made by purported class members seeking appointment and to determine the "member or members of the purported plaintiff class" that are "most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i).

In ruling on competing motions, the Court must adopt a presumption that the most adequate plaintiff is the person or group of persons who "has the largest financial interest in the relief sought by the class" and who "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption is rebuttable, however, upon proof that the presumptively most adequate plaintiff "will not fairly and adequately protect the interests of the class" or "is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); *see also, e.g., In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 98 (S.D.N.Y. 2005). Accordingly, the size of a movant's loss "is just a beginning point." *In re Cable & Wireless, PLC Sec. Litig.*, 217 F.R.D. 372, 377 (E.D. Va. 2003). "Courts acknowledge that they must also consider the movant's ability and willingness to adequately represent the class." *Id.*

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[2] In an endorsement dated March 13, 2009, the Court declined to appoint additional co-lead counsel in this consolidated action. At that time, however, there were no federal securities law claims before the Court, and the PSLRA was not implicated. Three firms had filed complaints alleging numerous state law claims and agreed to an unopposed stipulation and order, entered by the Court, appointing them as Interim Co-Lead Counsel. *See* Docket Entry No. 40. When a fourth case was filed and a pre-motion request was made by Cohen Milstein to move to appoint them as a fourth co-lead counsel, the Court declined, noting that Interim Co-Lead Counsel (counsel for the Anwar Plaintiffs) could adequately protect class members' interests. *See Laor, et al. v. Fairfield Greenwich Group, et al.*, No. 09 Civ. 2222 (filed Mar. 10, 2009) (Docket Entry No. 3). As explained below, however, it has since become obvious that an additional lead counsel is indeed necessary – and required by the PSLRA – to adequately pursue claims under the federal securities laws.

II. COMPETING MOVANTS ARE INADEQUATE TO REPRESENT THE CLASS

The adequacy requirement of Rule 23 turns on an examination of "(1) whether the proposed class counsel is qualified, experienced, and generally able to conduct the litigation; (2) whether the proposed lead plaintiff has interests that are antagonistic to other class members; and (3) whether the proposed lead plaintiff and the class possess sufficient interest to pursue vigorous prosecution of their claims." *Constance Sczesny Trust v. KPMG LLP*, 223 F.R.D. 319, 324 (S.D.N.Y. 2004). Here, the Anwar Plaintiffs clearly fail the second and third prongs of this test. They are therefore inadequate to serve as lead plaintiff, and their motion, accordingly, should be denied.

A. The Anwar Plaintiffs Have Interests Antagonistic to the Class

An antagonistic interest arises when there is a "fundamental conflict or inconsistency between the claims of the proposed class members" that "outweigh[s] the substantial interest of every class member in proceeding with the litigation." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 514-15 (S.D.N.Y. 1996).

In the memorandum in support of their motion for appointment as lead plaintiff, the Anwar Plaintiffs recite a litany of reasons why prosecuting claims for violations of federal securities laws in this consolidated action would detract from the seventeen other claims in their Consolidated Amended Complaint ("CAC"), and why, therefore, they "determined that it was not in the best interests of the class" to include such claims in the CAC. The Anwar Plaintiffs point out, for example, "the risk of dissipation of assets and the need to move quickly in the litigation, including discovery; the potential application of the discovery stay under the PSLRA; … the statutes of limitations and repose applicable to federal securities claims; the inability to assert holder claims under the federal securities laws; and uncertainty as to whether federal securities claims would add value over the common law claims already alleged." Anwar Mem. at 4. Each of these issues demonstrates the "fundamental conflict" between the seventeen common law claims in the CAC and the federal securities law claims as issue here. A proposed lead plaintiff who would jettison colorable claims because of uncertainty as to whether they "add value" to existing claims, because of limitations on discovery, or because such claims could not be prosecuted quickly enough, is unquestionably inadequate to pursue those claims.

The Anwar Plaintiffs insist that, if appointed lead plaintiff, they will "carefully review" the federal securities claims and "make a strategic decision whether … to assert [them] or to proceed in some other fashion." Anwar Mem. at 5. They cite one case to support the notion that this sort of "strategic" decision-making about which claims to sacrifice does not, *per se*, render a proposed lead plaintiff inadequate. *Id.* (citing *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 134-35 (5th Cir. 2005)). In *Feder*, however, defendants attempted to defeat a proposed class representative at the time of class certification because it had failed to name an outside auditor as a defendant. *Id.*[3] This is entirely different from the situation here, where the Anwar Plaintiffs have already indicated their intent to *abandon those claims entirely* in favor of their common law claims. If they profess to now change their mind, as was indicated in a recent letter from defendants' counsel to Magistrate Judge Katz, the only logical conclusion to be drawn from their change of heart is their concern that their motion for appointment of lead counsel and lead plaintiff will be denied. *See* Letter from Mark G. Cunha to the Honorable Theodore H. Katz (May 21, 2009) at 1 (attached to the Declaration of Catherine A. Torell ("Torell Decl.") at Ex. A).

Under these circumstances, there is a "fundamental conflict," or, at the very least, an "inconsistency" between the claims at issue which would preclude a lead plaintiff from simultaneously acting in the best interests of all members of the class. Thus, the Anwar Plaintiffs' interests are antagonistic to the interests of class members pursuing federal securities law claims, rendering them inadequate for appointment as lead plaintiff to represent such a class.

B. The Anwar Plaintiffs Will Not Vigorously Prosecute the Federal Securities Law Claims

In assessing whether a proposed lead plaintiff or class representative will vigorously prosecute a class action, "courts may consider the actual progress of the proceedings to that point." *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 577 (C.D. Cal. 2007). "A failure timely to prosecute the litigation … suggest[s] that the class representative is inadequate." *Id.* *See also* *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130-31 (1st Cir. 1985) (long delay in prosecution of case demonstrates plaintiff's indifference to protecting class interests).

By declining to include federal securities law claims in the CAC, the Anwar Plaintiffs have made clear that they do not intend to pursue such claims in this action, much less "vigorously prosecute" them. Now, in its motion for appointment as lead plaintiff, the Anwar Plaintiffs concede that they may abandon these claims altogether. These refusals to prosecute valuable federal securities claims go beyond slight, inconsequential delay. Indeed, they are far more damaging than, for example, the prejudice which might be caused by failure to timely move for class certification. *Cf., e.g., E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (failure to move for class certification before trial indicated that representative was inadequate). On the contrary, refusal to prosecute these claims will effectively result in their voluntary dismissal.

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[3] In *Feder*, the proposed class representative had allegedly not named the auditor as a defendant because the former was itself audited by the same firm. *Id.*

The implications of appointing the Anwar Plaintiffs as lead plaintiff to pursue claims under the federal securities laws are severe: they have already neglected to prosecute these claims, and have themselves conceded that they may abandon them altogether. Even if they now change their minds as appears might be the case, they cannot simply walk away from their self-professed reluctance to prosecute these claims and their view that it is not in the best interests of their clients to pursue them. The Anwar Plaintiffs' conduct is the antithesis of "vigorous prosecution," and renders them inadequate. There must be distinct lead plaintiff and lead counsel for the federal securities law claims.[4]

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[4] In addition to their antagonism toward the interests of the class and their failure to vigorously prosecute class members' federal securities claims, the Anwar Plaintiffs have failed to provide evidence that AXA Private Management ("AXA"), the plaintiff which leads their group in losses, has the authority to pursue claims on its clients' behalf. In the absence of such information, AXA is "subject to unique defenses" which render it inadequate. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 98 (S.D.N.Y. 2005) (holding that asset managers must have attorney-in-fact authority and unrestricted decision-making authority over their clients' accounts); *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 104 (2d Cir. 2008) (holding that asset managers lack standing to pursue securities claims on behalf of their clients absent assignment by the clients of their rights); *see also* Section C, *infra*.

C. The Knight Group Lacks Standing and Authority to Proceed in This Action

It is a basic requirement of Article III of the Constitution that a plaintiff be able to show "injury-in-fact" in order to have standing to sue. *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008) (citing U.S. Const. art. III, § 2). Accordingly, only actual purchasers and sellers of securities have standing to bring claims for violations of the federal securities laws. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754-55 (1975).

Courts in this district and elsewhere, therefore, have repeatedly required that lead plaintiff movants who have not purchased securities for their own accounts make an evidentiary showing that they are attorneys-in-fact for their clients and have unrestricted decision-making authority over the funds in their clients' accounts, *i.e.*, they must establish that they are "purchasers" for purposes of the federal securities laws. *See Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 255 (S.D.N.Y. 2003) (holding that the mere fact a client grants authority to an investment advisor to purchase stock on his/her behalf does not confer authority to commence suit on his or her behalf; rather, investment advisor must be attorney-in-fact for its clients with unrestricted decision-making authority); *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 98 (S.D.N.Y. 2005) ("In order for an investment advisor to attain standing on behalf of investors the transactions in question must have been executed as if by a single person. Moreover, the advisor must be the attorney in fact for his clients, and he must be granted both unrestricted decision-making authority and the specific right to recover on behalf of his clients."); *Kaplan v. Gelfond*, 240 F.R.D. 88, 95 (S.D.N.Y. 2007) (same); *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 633-34 (D.N.J. 2002) (investment advisor "may not bring the action on behalf of its clients because it did not function as a 'single investor' and it has not submitted any evidence that it received permission to move on its clients' behalf"). In *W.R. Huff*, moreover, the Second Circuit clarified that such power of attorney must be an express assignment of the claims at issue. *W.R. Huff*, 549 F.3d at 109.

The Knight Group has failed to provide any such evidentiary support for the authority of its group members to pursue this action on their clients' behalf. Indeed, the Knight Group does not even identify the beneficial owners of the Fairfield Sentry shares it claims to have purchased, as required by Rule 17 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 17 ("An action must be prosecuted in the name of the real party in interest."). The certification of Knight Services Holdings Ltd. gives no information about who, or what, Knight Services Holdings Ltd. actually is. Moreover, the certification is signed, illegibly, by an unnamed individual with no title or designation of responsibility. *See* Knight Group Mem. at Ex. 2. Similarly, certifications for the four trusts are signed as follows:

- Chartwell Trust:

  > Americas Fiduciary Ltd. by [signature illegible], on behalf of the Chartwell Trust, the managing partner of Greystone Holdings, by its trustee Americas Fiduciary Ltd.

- Casoti Trust:

  > Americas Fiduciary Ltd. by [signature illegible], on behalf of the Casoti Trust, the sole shareholder of Casoti Overseas Ltd., by its trustee Americas Fiduciary Ltd.

- Samba Trust:

  > Americas Fiduciary Ltd. by [signature illegible], on behalf of the Samba Trust, the sole shareholder of Heda Trading Ltd., by its trustee Americas Fiduciary Ltd.

- White Chapel Trust:

  > SwissCo Trust GmbH by [signature illegible], on behalf of the White Chapel Trust, the sole shareholder of White Chapel Invest & Trade Ltd., by its trustee SwissCo Trust GmbH

Knight Group Mem. at Ex. 3.

It is impossible to tell who these entities are or which, if any, are the beneficial owners of Fairfield Sentry shares. Although each of these certifications states that "Plaintiff has … authorized the commencement of an action on Plaintiff's behalf," there is no evidence that the named fiduciaries, or any other entities, are attorneys-in-fact for the beneficial owners, have unrestricted decision-making authority over the beneficial owners' accounts, or have been assigned any claims by the beneficial owners. They do not even state that the beneficial owners, or anyone else, has authorized the filing of a lead plaintiff motion or retained the law firm of Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein"), the Knight Group's counsel.

This is not the first time Wolf Haldenstein has, on a motion for appointment of lead plaintiff, failed to provide such information about its clients. In *Municipal Mortgage & Equity, LLC Sec. and Deriv. Litig.*, No. MDL 08-MD-1961 (D. Md. filed Aug. 15, 2008), the firm filed for appointment of lead plaintiff and lead counsel on behalf of a group composed of First Affirmative Financial Network, KT Investments LLC, and Kendall Investments LLC. As here, counsel gave no explanation of who or what these entities were, or of who the beneficial owners of the MuniMae stock were. The court denied the group's motion, noting that it had not established its losses because it had not provided the court with evidence that it acted "as an 'attorney in fact for [its] clients, and has been granted both unrestricted decision-making authority and the specific right to recover on behalf of [its] clients." *Municipal Mortgage & Equity, LLC Sec. and Deriv. Litig.*, No. MDL 08-MD-1961, slip op. at 7 (attached to the Torell Decl. as Ex. B) (quoting *In re eSpeed*, 232 F.R.D. at 98). Further, the court held that even if the group had established that it was the presumptive lead plaintiff (which it had not), its adequacy would be undermined by potential conflicts of interest between the named entities and beneficial owners "with regard to advice given (or not given) in regard to the clients' transactions in MuniMae shares."

The Knight Group's failure to provide this information to the Court is fatal to its motion for appointment as lead plaintiff. It does not possess the financial interest it claims, and, even if it did, would remain inadequate to represent the class. Accordingly, the Knight Group's motion should be denied.

CONCLUSION

For the foregoing reasons, the Court should grant the motion of the Fairfield Investor Group to (i) appoint the Group as Lead Plaintiff and (ii) appoint Cohen Milstein Sellers & Toll PLLC as lead counsel, and deny the competing motions.

Dated: New York, New York
May 29, 2009

Respectfully submitted,

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